No. 84-1360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,
v.
PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE COUNCIL OF STATE GOVERNMENTS, AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

May a city government require that "adult" motion picture theaters not be placed where they would adversely affect children, schools, churches, property values and the quality of life, but instead be located in more suitable commercial areas?

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE NATIONAL ASSOCIATION OF COUNTIES, THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, THE UNITED STATES CONFERENCE OF MAYORS, THE COUNCIL OF STATE GOVERNMENTS, AND THE AMERICAN PLANNING ASSOCIATION IN SUPPORT OF APPELLANTS

Pursuant to Rule 36 of the Rules of the Court, *amici* respectfully move this Court for leave to file the attached brief *amicus curiae* in support of appellants City of Renton and its officials.*

The *amici* are organizations whose members include state, city and county governments and officials located

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* Appellants have consented to the filing of this brief. Appellees have not.

throughout the United States, and an organization of city and regional planners and officials concerned with planning and orderly urban development.

The question in this case, whether a city government may require that "adult" motion picture theaters be located where they would not adversely affect the quality of community life, is one of great importance to *amici* and their members. This question vitally affects the power of government to regulate and plan in the public interest by limiting the permissible locations of "adult" entertainment uses.

Subsequent to this Court's decision in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976), city officials across the nation, acting under the guidance of the *Young* case, have attempted to reconcile First Amendment values with traditional zoning principles. However, decisions of the Ninth Circuit and other federal courts of appeals that have overturned ordinances essentially similar to the ones upheld in *Young*, have left local governments virtually crippled in dealing with the adverse affects of the "adult" entertainment industry. For these reasons *amici* are deeply concerned over the outcome of this case and are submitting this brief to assist the Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF THE *AMICI*

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

The *amici* agree with the statement of the case submitted by the City of Renton. However, *amici* also wish to emphasize specific important facts.

Renton is typical of many cities [1] throughout the country in its efforts to engage in comprehensive planning. Laws to provide a pleasant environment, to protect health, to promote orderly growth, and to enhance the public safety are the very stuff of local and state governments. Cities, counties and states use zoning regulations as one tool to accomplish the goal of making communities desirable places to live.[2]

In April, 1965, Renton adopted its first comprehensive plan.[3] Among its purposes are to "improve the physical and social environment of the city as a setting for human activities—to make it more functional, beautiful, decent, healthful, interesting and efficient." [4]

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[1] The references to "cities" in this brief should be read as including other general purpose units of state and local governments, many of which have adopted zoning ordinances or statutes similar to that in question. F. Strom, *Zoning Control of Sex Businesses* 1 (1977).

[2] Local governments may zone for the public welfare. A city may strive to be "beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26 (1954); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See* Comment: *Zoning, Aesthetics and the First Amendment*, 64 Col. L. Rev. 81, 82 (1964).

[3] The plan states Renton's planning goals as follows: "The overriding consideration is to promote public safety, welfare, and interest. Additional factors to be considered (not in order of priority) are preservation of property rights, protection of life and property, equal opportunities, public interests prevailing over private interests, and economic and social benefits." City of Renton, *Comprehensive Plan Compendium 3*, January 1985 (available at City Hall, Renton, Washington).

[4] Other purposes are: "To insure acceptable levels of access, utilities and other public services to future growth and development[;] To promote the public interest, and the interest of the City at large[;] To facilitate the democratic determination and implementation of City policies and developments; To effect coordination in development; To inject long-range considerations into the determination of short-range actions; and To provide professional and technical knowledge in the decisions affecting development of the City." City of Renton, *Comprehensive Plan Compendium*, *supra* at 3.

As part of its comprehensive plan, Renton adopted area-specific plans including one for the central area of the city. That plan was developed and refined "through a process of field analysis, data gathering and public input at two public meetings and one public hearing" between 1979 and 1982.[5] The central downtown area was conceived as one providing for "sufficient retail services to accommodate the projected residential and employment population of the area." [6] It incorporates a "variety of housing opportunities, including single family and multiple family housing" for close-in living, and church and school uses which are part of the neighborhood.[7] Development and redevelopment were planned

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[5] City of Renton, *Comprehensive Plan Compendium*, *supra* at 61. In adopting specific ordinances, which form part of the comprehensive plan, the usual local government process of study, committee meetings, council meetings and public hearings was followed. For example, before the Council adopted the "adult" theater ordinance in question, the Planning and Development Committee held at least six meetings. Jurisdictional Statement of Appellants, at 5, fn. 4.

[6] City of Renton, *Comprehensive Plan Compendium*, *supra* at 62.

[7] *Id.* at 61. The Washington Superior Court said that Renton has retained much of its original downtown core area which contains not only "commercial uses, but single residences and church and school uses which have been, and continue to be, a part of a neighborhood." Memorandum Decision, March 9, 1984, *City of Renton v. Playtime Theatres, Inc.*, Superior Court for The State of Washington for King County No. 82-2-02344-2, SLLC App. pp. 5a-6a. (References in this form are to the Appendix to this brief filed by the State and Local Legal Center in support of *amici*.) The state court judge also noted that "[s]ubstantial recent investment in amenities is clearly evident and within a very close proximity of the theatre,

along the Cedar River to maintain a recreational flavor in that portion of the community.[8]

As part of the effort to maintain the central area of the city as a good place to live, Renton adopted a number of zoning ordinances,[9] including one adopted in April, 1981, dealing with "adult" motion picture theaters. Patterned after the Detroit ordinance approved by this Court in *Young v. American Mini Theaters*, 427 U.S. 50 (1976),[10] the ordinance attempts to prevent the operation of "adult" motion picture theaters in areas close to schools, residences, churches and public parks.[11] It was

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residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities . . ." *Id.* at 6a.

[8] City of Renton, *Comprehensive Plan Compendium, supra* at 63.

[9] *Id.* at 1. *See also* Renton, Wash., Code, Chapter 7 of Title 4, Zoning, §§ 4-701 *et seq.* (available at Renton City Hall, Renton, Washington).

[10] The Renton ordinance, unlike the Detroit ordinance, provides only for civil, not criminal, penalties.

[11] The first ordinance, adopted in April, 1981, contained the following definition:

> " 'Adult Motion Picture Theatre'. An enclosed building used for presenting motion picture films, video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas' as hereafter defined, for observation by patrons therein."

The ordinance prohibited "adult" motion picture theaters within 1000 feet of any residential zone or any single family or multiple family use, or church or any public park or park zone. It also prohibited such use within one mile of any public or private school. App. L, 79a. This latter provision was amended in May, 1982 to prohibit "adult" theatre uses within 1000 feet of any school, thus expanding the area available for such entertainment facilities. App. M, 87a. The amended ordinance also clarified the term "used" by defining it as

> "a continuing course of conduct of exhibiting 'specific [specified?] sexual activities' and 'specified anatomical areas' in a manner which appeals to a prurient interest." *Ibid.*

adopted after almost a year of study, which included public hearings at which the city council heard testimony and reviewed exhibits indicating the potential adverse effects of "adult" entertainment uses on property values and the social climate of business and residential areas of the city.

The ordinance, which expressly relied on the known adverse effects of "adult" motion picture theatres on neighborhoods in Seattle, Detroit and other cities, was adopted before any such use was established or, as far as anyone knew, contemplated in Renton itself.

The District Court found that, under the ordinance, five hundred and twenty acres, or approximately five percent of the city's total land area, remained available for "adult" motion picture use. The available land, the Valley Planning Area, is "a developing area of industrial, commercial, and office uses." It is to be "developed with a diversity of high quality industrial, commercial and office uses" and "should be the principal growth area for these uses" within the city.[12] It is adjacent to a freeway interchange and is within 15 minutes driving distance of any area in Renton.

In January, 1982, Playtime purchased the Renton theater, knowing that it was within an area proscribed by the ordinance, for the admitted purpose of exhibiting "adult" motion pictures. Before completing its purchase, Playtime filed this action, on January 20, 1982, asking that the ordinance be declared unconstitutional and that its enforcement be permanently enjoined.[13] On January

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[12] City of Renton, *Comprehensive Plan Compendium, supra* at 31. Only one small portion is designated for heavy industrial use. *Id.* at 47.

[13] A month later, in February, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face, and alleging that an actual dispute existed because of Playtime's pending federal lawsuit asserting that the

11, 1983, the district court, adopting the findings of a magistrate, granted a preliminary injunction. App. A, 35a-36a.

On February 17, 1983, the district court denied the permanent injunction. App. 32a. Finding that five hundred and twenty acres were available as potential sites for adult theater use, the court concluded that the ordinance did not substantially restrict interests protected by the First Amendment. The court also held that the city was not required to show specific adverse impact on Renton from the operation of adult theaters, but could rely on the experiences of other cities. Lastly, the court found that the purposes of the ordinance were unrelated to the suppression of speech and that the restrictions it imposed were no greater than necessary to further the governmental interests at stake.[14]

Playtime appealed, and the Ninth Circuit reversed. The court of appeals declared that abstention was inappropriate and that it had an obligation to scrutinize strictly zoning decisions that infringe First Amendment rights. It disagreed with the district court as to the availability of land and concluded that the limitation on

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ordinance was unconstitutional. Renton also moved to dismiss Playtime's federal action on grounds of abstention. The district court subsequently ruled that abstention was improper. App. A, 4a.

[14] The state court complaint was later amended by Renton to seek abatement of the operation of the theater. The Superior Court judge used an advisory jury drawn from the King County jury pool, which represented a cross-section of individuals and backgrounds, to consider ten films stipulated to be typical of those presented at the Renton theater by Playtime. Mem. Dec. Sup. Ct. Wash., SLCC App. pp. 15a-29a. The court applied the high standard of proof, *i.e.*, clear, cogent and convincing evidence, used in *Cooper v. Mitchell Brothers' Santa Ana Theatre*, 454 U.S. 90 (1981), *reh'g denied*, 456 U.S. 920 (1982), in determining that Playtime's exhibition of the films submitted to the court as typical constituted "a nuisance per se, and an 'adult motion picture theatre' as defined" in the ordinance and should be abated. Mem. Dec. Sup. Ct. Wash., SLLC App., p. 40a.

the area allowed for "adult" theater uses would cause a substantial restriction of freedom of speech. Using the four-part standard of review set forth in *United States v. O'Brien*, 391 U.S. 367 (1968),[15] the Ninth Circuit subjected the district court's decision to *de novo* review as involving mixed questions of fact and law.

The court of appeals conceded that, under the *O'Brien* test, the regulation was within Renton's constitutional power, but stated that Renton had not shown a substantial governmental interest in enacting the ordinance, as the ordinance itself contained only conclusory statements. The Ninth Circuit also found that Renton did not meet the third prong of the *O'Brien* test, as Renton "has not proved that the regulation is unrelated to the suppression of speech." The court never reached the fourth prong of the test to determine whether "the incidental restriction on First Amendment freedom is no greater than essential to further [Renton's governmental] interest."

SUMMARY OF ARGUMENT

1. "Adult" entertainment uses have an adverse impact on land values, the quality of life and the social environment of cities. To limit this impact, while simultaneously leaving ample space free for "adult" theaters, Renton and other cities have enacted zoning laws which regulate the permissible locations of "adult" entertainment uses. Such laws accord with this Court's decision in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). There, the Court recognized that such regulation

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[15] The test is: "A governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. at 377 (1968).

could properly be based on the content of "adult" entertainment and that dissemination of material bordering on pornography receives less constitutional protection than dissemination of ideas of social and political significance. The decision below is inconsistent with *Young* and frustrates the efforts of cities to maintain the social environment while protecting First Amendment rights by leaving ample land free for "adult" entertainment.

2. The Ninth Circuit did not allow Renton to rely on the extensive experience of other cities when enacting its zoning ordinance. Under the court's decision, Renton is left with two choices. It can permit the decay accompanying unregulated placement of "adult" theaters to set in before remediation, or it can commission expert studies that will show that decay will occur in Renton no less than in other cities.

Both choices are insupportable. To allow decay to occur is directly contrary to the purposes of city planning and is required by no decision of this Court. To commission studies instead of relying on the widespread experience of other communities is onerously expensive for small communities such as Renton, is redundant because the studies would simply duplicate prior learning developed elsewhere, conflicts with the common tradition whereby cities learn from each other's experiences, and is inconsistent with *Young*, in which the Court upheld a Detroit ordinance based on experience in other cities.

3. The plurality and concurrence in *Young* both stressed that cities have a crucial interest in maintaining the quality of urban life. The Court equally made clear that cities can experiment with reasonable methods for dealing with the problems created by "adult" entertainment uses: cities can require dispersal of such uses, as Detroit did, or can require their concentration.

The Ninth Circuit, however, paid small heed to cities' critical interest in preserving the social environment, and struck down Renton's ordinance because it required con-

centration rather than dispersal of "adult" uses. The Court's opinion is therefore inconsistent with *Young* and is erroneous.

4. The Ninth Circuit claimed Renton had failed to prove it was not motivated by a desire to suppress speech; the court therefore assumed Renton *did* have such a motive. In so ruling, the court glossed over legislative findings by the city council that unrestrained placement of "adult" theaters will cause serious adverse consequences to the community.

The decision was erroneous. As this Court has held, inquiry into legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). It is especially hazardous where, as here, the context includes statements made at open public hearings by any members of the public who wished to speak.

The purpose of public hearings is not to make a record of legislators' views for purposes of constitutional adjudication. Rather, it is to permit all and sundry to exercise their First Amendment rights of speech and petition by directly addressing their government in a time-honored way. Those who speak are free to make statements that are rude, ill-conceived, divisive or plain wrong. By holding public hearings, legislators do not adopt the views of those who testify. To the contrary, legislators quickly become adept at listening to all points of view without being unduly influenced.

Furthermore, if only constitutionally sanitized statements were allowed at public hearings, as appears to be demanded by the Ninth Circuit's ruling, the result would be gross censorship. And if public hearings were not held for fear some members of the public might make statements that will later be used to impeach legislation, legislators would be deprived of sources of information needed when considering legislation.

5. The lower federal courts should have abstained in this case.

This Court has ruled that comity and deference must be shown to state tribunals when state civil litigation involves important local interests, and that abstention is also proper when a state suit is commenced before substantial proceedings have occurred in a prior federal suit. This case meets both these criteria. Furthermore, a failure to abstain here would sanction tactics by which businesses such as Playtime can vitiate the rules of comity and deference by filing preemptive federal suits before a city even knows an "adult" theater is being established.

In a prior case involving legally indistinguishable facts, from Renton's sister city of Seattle, the Supreme Court of Washington ruled the Seattle ordinance constitutional. *Northend Cinema v. City of Seattle*, 90 Wash.2d 709 (1978). Thus, by not abstaining, and then ruling against the Renton ordinance, the lower federal courts in this case have encouraged an unseemly race to the courthouse. The decision enables entrepreneurs like Playtime to avoid state courts by purchasing an establishment and immediately suing in federal court to enjoin an ordinance, before a city even knows of their plans to show "adult" movies. In this way, this Court's oft-stated rule of deference to state tribunals will be undermined, and different rules of law will prevail in sister communities—an unseemly and anomalous situation.

ARGUMENT

I. CITIES MUST PLAN AND ZONE TO PROTECT THE QUALITY OF LIFE

A. The Decision Below Cripples a City's Ability to Maintain the Viability of Community Life And Is Inconsistent With This Court's Decision in *Young v. American Mini Theatres*

To allow each use a place without infringing on the rights of others to enjoy "the city as a setting for human activities"—"functional, beautiful, decent, healthful, interesting and efficient" [16]—is the basic task of city planners. "Adult" entertainment uses affect this task because, as anyone who has visited a major city in the last few years is well aware, such uses affect the general social environment.[17] Accordingly, Renton, like other cities, attempted to limit the adverse impact on land values and the quality of life caused by the proliferating "adult" entertainment industry.[18]

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[16] City of Renton, *Comprehensive Plan Compendium, supra* at 3.

[17] Marcus, *Zoning Obscenity: Or, the Moral Politics of Porn*, 27 Buffalo L. Rev. 1 (1978). *See Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of "adult" theaters; *see also City of Norfolk v. Tiny House, Inc.*, 222 Va. 414, 281 S.E.2d 836 (1981), upholding zoning ordinance requiring a use permit for "adult" uses within 1000 feet of other adult uses; *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981), sustaining restriction on location of "adult" entertainment center where there was substantial area available for operating such a center. *Compare Marco Lounge, Inc. v. City of Federal Heights*, 625 P.2d 982 (Colo. 1981), striking down zoning ordinance confining "adult" entertainment to "entertainment districts" which were not provided for within city limits.

[18] As the Washington Superior Court noted: "For a small commercial area, the impact of one theatre of this nature certainly can be deemed to alter the atmosphere of the neighborhood, is likely to affect property values, deter residents from remaining and adversely will impact criminal activity." Memorandum Decision, SLLC App., pp. 7a-8a.

Renton's efforts were in accord with the decision of this Court in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976). There, this Court approved a zoning ordinance that treated "adult motion picture theatres" as a "regulated use" and limited the area in Detroit in which such theaters could be located. The plurality expressly recognized that such regulation could be based on content, 427 U.S. at 70, and pointed out that there is a "less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance. . . ." *Young*, 427 U.S. at 61.[19]

The Court carefully balanced a concern for the communal quality of city life with the interest in preserving First Amendment values and protecting the free dissemination of ideas. The Court thus said: "The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." 427 U.S. at 62.

Relying on the decision in *Young*, and concerned with the spread of enterprises which have contributed to neighborhood deterioration and blight, many cities have enacted zoning laws which regulate the location of "adult" motion picture theaters while simultaneously allowing ample space for many such movie houses.[20] Although these ordinances have often been upheld by state supreme

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[19] *See also* Clor, *Public Morality and Free Expression: The Judicial Search for Principles of Reconciliation*, 28 Hastings L.J. 1305, 1306 (1977); Toner, *Regulating Sex Businesses*, Am. Soc. Plan. Off., Rep. No. 327, p. 1 (1977).

[20] Appellant's brief reviews the factual evidence and demonstrates persuasively that Renton left ample land free for adult enitertainment uses. *See* App. Br. at 29-36.

courts,[21] only one has been sustained by a federal court of appeals,[22] and several others, including Renton's, have been struck down by federal courts of appeals.[23] The decision below is inconsistent with *Young's* approval of city efforts to address the serious problems caused by the "adult" entertainment industry. Such decisions cripple cities in their efforts to maintain the quality of community life. This should not be. Under *Young*, cities may protect their neighborhoods, family life, and children from urban blight[24] while protecting First Amendment rights by allowing ample space for "adult" entertainment.

B. Cities Should Not Be Forced to Choose Between Permitting Decay Before Remediation and Undergoing the Expense of Commissioning Expert Studies That Predict Known Effects

The Ninth Circuit ruled that Renton could not justify its ordinance by relying on the experience of other cities that had found that the unregulated proliferation of "adult" theaters caused severe adverse secondary effects.

This ruling leaves cities with but "a small choice in rotten apples."[25] Under the decision below, there are only two ways for a city that lacks "adult" theaters to gather evidence on the secondary harms from such en-

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[21] *E.g., City of Norfolk v. Tiny House, Inc.*; *City of Minot v. Central Ave. News, Inc.*, *supra*.

[22] *See Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), sustaining zoning ordinance restricting location of "adult" theaters.

[23] *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982); *Fantasy Bookshop, Inc. v. City of Boston*, 652 F.2d 1115 (1st Cir. 1981); *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981); and *CLR Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983).

[24] "The protection of children from the negative effects of pornography, both as a development and safety concern, is surely an important state interest . . . ." Memorandum Decision, SLLC App., p. 11a. *Cf. New York v. Ferber*, 458 U.S. 747 (1982).

[25] W. Shakespeare: *The Taming of the Shrew*, I, i, 137.

terprises. The city may permit entry of such theaters and allow the decay which has accompanied them in many other cities to set in, or the city may commission studies and hire experts to predict the effects of "adult" theaters on its community.

To wait for the harm to occur is exactly what wise urban planning seeks to avoid: the very purpose of city planning is to foresee and prevent the evils which can arise from conflicting or potentially harmful land uses, rather than to permit their occurrence before seeking a remedy.[26] Nor did the Ninth Circuit point to any decision of this Court requiring cities to await the harm before remediation. The court could point to none because there is none.

The other alternative left to cities under the Ninth Circuit's decision—to commission a study of the potential effects of adult theaters in each concerned community—is no sounder and no more supportable. Such a study would be onerously costly and time consuming for a small city like Renton. It would also be redundant and cumulative of existing studies that already predict the harmful effects of "adult" entertainment uses based on the opinions of experts and the experiences of other cities.[27] Furthermore, requiring a study in each community would

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[26] Justice Powell, concurring in *Young*, pointed out that "zoning, when used to preserve the character of specific areas of a city, is perhaps the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Young*, 427 U.S. at 80, citing *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974).

[27] *See, e.g.*, Department of Metropolitan Development, Division of Planning, Indianapolis, Indiana, *Adult Entertainment Businesses in Indianapolis: An Analysis, 1984*; Planning Department, City of Phoenix, *Adult Business Study* (May 25, 1979); Department of City Planning, City of Los Angeles, *Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles* (City Plan Case No. 26, 475, June 1977).

thwart the normal planning and zoning process under which cities learn from the experience of other cities.[28] And requiring each city to conduct its own study is inconsistent with *Young* because that case upheld a Detroit ordinance that was based on reports and evidence concerning experiences in other cities.[29]

Rather than await urban decay or conduct an elaborate and redundant study, Renton chose the direct course. The City Council relied on published studies and on the experience of other cities.[30] Significantly, the Council gave special consideration to the situations in Seattle and Tacoma, cities which are located in the same metropolitan area as Renton itself. The opinion of the Ninth Circuit supplies no rationale for rejecting the relevance to Renton of the adverse effects of "adult" entertainment uses in the sister cities of Seattle and Tacoma, or in Detroit. The opinion is plainly insupportable.

C. Cities Should Be Free to Experiment With Different Solutions to Important Urban Problems

Speaking for the majority in *Young*, Justice Stevens said that "the city's interest in attempting to preserve

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[28] Model zoning codes are enacted for this very purpose. *See, e.g.*, Nichols, *Cyc. Legal Forms* (1983); Toner, *Regulating Sex Businesses*, Am. Soc. Plan. Off., Rep. No. 327 (1977).

[29] As noted by Justice Powell in his concurring opinion in *Young*, 427 U.S. at 81: "That evidence consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay that had been started in areas of *other* cities, and that could be expected in Detroit, from the influx and concentration of such establishments" (emphasis added). And as Justice Stevens stated in an analogous vein: "In the opinion of urban planners and real estate experts who supported the ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere." 427 U.S. at 55.

[30] Appendix to Jurisdictional Statement, App. M and N.

the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71. Similarly, in his concurring opinion, Justice Powell said: "Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental, and economic values." *Id.* at 80.

Despite these expressions from this Court, the Ninth Circuit paid little heed to Renton's substantial interest in preserving the quality of community life. The opinion focused instead on the fact that Renton "does not solve the problem in the same manner" as Seattle and Detroit. Detroit, for example, required dispersal of adult theaters, whereas the ordinance in Renton would result in their concentration. But in *Young*, this Court did not hold that the specific solution adopted by Detroit was the only acceptable way to deal with the problem. The opinion drew no such line. To the contrary, the Court expressly intended that cities would be free to experiment with solutions adapted to their own communities. The opinion specifically noted:

> "[W]e have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, *either* by confining them to certain specified commercial zones *or* by requiring that they be dispersed throughout the city." *Id.* at 63-64. (Emphasis added.)

The Court added:

> "It is not our function to appraise the wisdom of [the Detroit City Council's] decision to require adult theaters to be separated rather than concentrated in the same areas . . . . The city's interest in attempting to preserve the quality of urban life must be accorded high respect. . . . [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Id.* at 71.[31]

[31] *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), Brandeis, J., dissenting:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

The Court's holding in *Young* that cities are free to adopt varying solutions—which validates the action taken by Renton—draws further support from the reasoning in Justice Powell's concurring opinion in *Young*. Justice Powell termed it "undeniable" that "a zoning ordinance that merely specifies where a theater may locate, and that does not reduce significantly the number or accessibility of theaters presenting particular films, stifles no expression." *Young*, 427 U.S. at 81, fn. 4.[32] He also correctly stated that cases of this type involve only the government's right to "tailor its reaction to different types of speech according to the degree to which its special and overriding interests are implicated." [33]

By ignoring the reasoning of both the plurality and concurring opinions, the Ninth Circuit violated *Young*'s teaching that crucial city interests are at stake and municipalities can experiment with reasonable solutions to the problems.

[32] Justice Powell noted: "The burden . . . is no different from that imposed by more common ordinances that restrict to commercial zones of a city movie theaters generally as well as other types of businesses presenting similar traffic, parking, safety, or noise problems. After a half century of sustaining traditional zoning of this kind, there is no reason to believe this Court would invalidate such an ordinance as violative of the First Amendment. The only difference between such an ordinance and the Detroit ordinance lies in the reasons of regulating the location of adult theaters. The special public interest that supports this ordinance is certainly as substantial as the interests that support the normal area zoning to which all movie theaters, like other commercial establisments, long have been subject." *Young*, 427 US. at 80, fn. 3.

[33] *Id.* at 81, fn. 6.

II. ILLICIT MOTIVES SHOULD NOT BE ATTRIBUTED TO LEGISLATIVE BODIES ON THE BASIS OF STATEMENTS MADE BY CITIZENS AT PUBLIC HEARINGS

The Ninth Circuit said Renton "has not shown that it was not motivated by a desire to suppress *speech* based on its content." 748 F.2d at 537 (emphasis added). Because Renton did not prove the negative, the court inferred the opposite: that "a motivating factor . . . was suppression of the content of the speech." 748 F.2d at 537. In doing so, the court glossed over the city council's findings, expressed in the ordinance itself, that serious adverse consequences would flow from the unrestrained introduction of adult theaters in any location desired by profit-minded operators.

The Ninth Circuit committed error in impugning the motives of the Renton city council and then relying on other imputed motives as a ground for striking the statute. As this Court has pointed out, undertaking an inquiry into legislative motive is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).[34] It is especially hazardous where, as in this case, the context is one of public meetings at which all and sundry are invited to address their government. To infer an intent to suppress First Amendment rights from statements made at such meetings by members of the public will destroy the governmental and constitutional function of public hearings.

The very purpose of public hearings is to allow citizens access to leaders of government to state their views; the purpose is not to build a record for constitutional adjudication. In this country, we have a long tradition,

[34] "[I]nquiry into legislative motive is often an unsatisfactory venture. . . . What motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it . . . ." (*citing United States v. O'Brien*); *Pacific Gas & Elec. v. St. Energy Resources Conserv.*, —— U.S. ——, 103 S.Ct. 1713, 1728 (1983).

antedating the founding of the Nation, of the people's exercise of the rights of free speech and petition by addressing governmental leaders at open meetings. Thus, if people in this country have a right to watch "adult" movies, a right that we freely concede, they surely have an equal right to attend public hearings and tell their city council of their objections to such movies.

Yet those very statements of objection, protected by the First Amendment, are here being used to attribute forbidden motives to the Renton city council. This attribution is improper because legislators have no practicable choice but to hear those statements or to hold no public meetings.[35] Adopting laws without any discussion by the public at open hearings would deny legislators information needed before decisions are made, while simultaneously thwarting the constitutional and governmental tradition of allowing citizens to be heard on matters vitally affecting their welfare. This correlative notion, that the constitutional right of citizens to petition government must also engender an obligation on the part of government to provide a forum for the citizenry, has been addressed by this Court.[36]

Moreover, to permit only constitutionally sanitized statements at "public meetings" would not only be gross censorship, but a contradiction in terms. The Ninth Circuit apparently assumes that legislative leaders cannot hear from the public without adopting *in toto* the

[35] Washington and most other states require local governments to hold open meetings and public hearings on matters before them.

[36] *See, e.g., City of Madison, etc. v. Wis. Emp. Rel. Com'n*, 429 U.S. 167 (1976). One of the fortunate attributes of our intergovernmental system is that this constitutional protection is afforded to everyone, rational or irrational, commonsensical or nonsensical alike. The citizen critic, who tests the motives of government is esteemed in American society: "It is as much his duty to criticize as it is the official's duty to administer." *N.Y. Times v. Sullivan*, 376 U.S. 254, 282 (1964).

statements made by those who testify. It also assumes that, in hearing from the public, legislative bodies are creating a record of their own views. Anyone who had such an illusion would find it quickly dispelled by attendance at legislative hearings. Legislative hearings are not courts of law, and judicial rules do not apply. Citizens are perfectly free to urge positions that are ill-conceived, rude, divisive, or just plain constitutionally wrong. Legislators quickly become expert at listening to all witnesses without being unduly influenced. Thus, as the district court wisely concluded in this case:

> "Predictably, some citizens expressed concerns reflecting their values which might be impermissible bases for justification of restrictions affecting first amendment interests. . . . The inclusion of these statements should not negate the legitimate, predominate concerns of the City Council nor lessen the value of the circumstantial evidence of adult land uses' effects in nearby cities." J.S. App. 31a.

III. THE NINTH CIRCUIT'S FAILURE TO ABSTAIN IS INCONSISTENT WITH THE DOCTRINE OF *YOUNGER v. HARRIS*

The Ninth Circuit, without explanation, affirmed the ruling of the district court that "abstention is inappropriate in this case." This ruling is inconsistent with the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny.[37]

In *Younger v. Harris*, this Court ruled, in an oft-quoted passage, that federal court interference with ongoing state court criminal proceedings was prohibited by traditional equity principles as well as

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[37] Appellant, although it did not directly present this issue for review, does maintain that the courts below erred in regard to abstention. App. Br. at 11, fn. 16. Given the quasi-jurisdictional nature of the abstention question, the Court could properly decide that abstention was required.

> "the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'our Federalism' . . . ."

Younger's doctrine of abstention since has been extended in two important ways, based upon these ideas of equity, comity, and federalism. This Court has decreed abstention with respect to ongoing state civil proceedings involving important state policies.[38] It has also required abstention where there is no ongoing state proceeding when a federal action is filed, but a state court suit is thereafter begun "before any proceedings of substance on the merits have taken place in federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

These principles converge in this case and demonstrate that the district court should have abstained from resolving Playtime's challenge to the ordinance after the city raised the identical issues in the state courts. There is no question that the case involves "the vindication of important state policies." *Middlesex County, supra*, 457 U.S. at 432. As the Court said in *Young v. American Mini-Theatres, supra*, "[t]he city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." 427 U.S. at 71. Nor had there been proceedings of substance in the federal courts when the state court proceedings began. Playtime filed this suit in federal court seeking injunctive relief even before completing its purchase of the Renton Theatre.

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[38] *See Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Moore v. Sims*, 442 U.S. 415 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S .423 (1982).

Renton's own state court proceeding seeking declaratory and injunctive relief in support of the ordinance was filed only a month later. Such facts bring this case within the reasoning of *Hicks v. Miranda, supra.*

The effect of the Ninth Circuit's decision clearly discloses the problems which arise from the failure of the federal courts to abstain in this case. This Court itself sought, in *Miller v. California*, 413 U.S. 15 (1973), to return judgments about obscenity to the local level. That objective has been frustrated here. Furthermore, here, two courts, one state and one federal, both with jurisdiction over events in the state of Washington, have arrived at diametrically opposite decisions on closely similar facts. The Supreme Court of Washington, in *Northend Cinema v. City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied sub nom. Apple Theatre, Inc. v. City of Seattle*, 441 U.S. 946 (1979), upheld a Seattle ordinance limiting "adult" motion picture uses to an area of approximately 250 acres in a city of nearly half a million people. The Ninth Circuit, by contrast, struck down the Renton ordinance, which left an area twice as large available for "adult" theaters in a city of less than 35,000. Such diverse results based on legally indistinguishable facts from sister communities can only encourage a race to the courthouse in search of a favorable forum.[39]

Although conceding that *Younger v. Harris, supra*, should not require such a race, the Ninth Circuit nevertheless has encouraged such unseemly competition. For absent abstention, an entrepreneur will know that all he need do to avoid state courts is to purchase an establishment and sue immediately in federal court to enjoin enforcement of the ordinance—as was done here. Playtime's

[39] *Adult World Bookstore v. City of Fresno*, 758 F.2d 1348, 1350 (9th Cir. 1985); *Playtime Theatres, Inc. v. City of Renton*, 748 F.2d 527, 533 (9th Cir. 1984).

preemptive strike in federal court occurred before the city even knew of the plans to show "adult" movies, and obviously before the city could file an enforcement proceeding in state court. The tactics used here, moreover, can also be used by theaters all across the country.[40] Abstention is particularly appropriate, as Justice O'Connor recently explained, where application of a local legislative enactment is questioned on constitutional grounds:

> "[I]n cases involving First Amendment challenges to a state statute, abstention may be required 'in order to avoid unnecessary friction in federal-state relations [and] interference with important state functions . . .'" *Brockett v. Spokane Arcades, Inc.*, —— U.S. ——, 53 U.S.L.W. 4793, 4798 (1985), concurring opinion of Justice O'Connor.

Without abstention by the federal courts, state court jurisdiction will be ousted and this Court's oft-stated doctrine of deference to state tribunals will be undermined.

The *Younger* abstention doctrine should apply to cases such as this, where vital state interests are involved and state law does not bar the interposition of the constitutional claim.[41]

[40] Playtime Theatres was one of the unsuccessful litigants in the *Northend Cinema* case in which the Supreme Court of Washington upheld the Seattle ordinance. Since then, Playtime has consistently filed its litigation in federal court. *Spokane Arcades, Inc. v. Brockett*, 631 F.2d 135 (9th Cir. 1980), *aff'd*, 454 U.S. 1022 (1981); *J.F. Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd*, —— U.S. ——, 53 U.S.L.W. 4793 (1985); *Playtime Theatres, Inc. v. City of Tacoma*, 9th Cir., No. 81-3544 (unpublished decision, Oct. 25, 1982); *Playtime Theatres, Inc. v. City of Bremerton*, U.S. D.C., W.D. Wash., No. C-81-193V.

[41] We note that the Washington Superior Court Judge gave very thoughtful consideration to the First Amendment objections raised by Playtime. After reviewing the nature of the affected neighborhood and the deleterious consequences which would occur, she properly concluded that the exhibition of the films was a nuisance *per se* and constituted an "adult motion picture theatre" as defined in the Renton ordinance, and should be abated. Mem. Dec. Sup. Ct. Wash. SLLC App. p. 40a.

CONCLUSION

The decision below conflicts with cities' efforts to maintain viable communities, is inconsistent with the decision in *Young*, and violates the doctrine of *Younger v. Harris*. For all these reasons, it should be reversed.

Respectfully submitted,

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June 30, 1985

APPENDIX

APPENDIX

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR KING COUNTY

No. 82-2-02344-2

CITY OF RENTON,
a municipal corporation, *et al.*,
Plaintiffs,

vs.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Defendants.

MEMORANDUM DECISION

I. *PROCEDURAL POSTURE OF CASE.*

The Municipality of Renton in this cause seeks to enforce its ordinance as enacted and amended to abate as a nuisance, per se, the exhibition of certain sexually explicit films by defendant corporation in a theatre, located at 507 South Third Street, Renton, Washington. The defendants also sought to have Renton enjoined from enforcement of its ordinance and have the same declared unconstitutional in a U.S. Federal District Court of Western Washington Cause No. C82-59 M. *Playtime Theatres Inc. et al. v. City of Renton, et al.* After extensive evidentiary hearings, that challenge was denied by U.S. District Court Judge Walter F. McGovern and an appeal has been taken from the decision to the U.S. Ninth Circuit Court of Appeals and is presently pending.

This court has accorded deference to the U.S. District Court decision, has made the proceedings, including transcripts and certain exhibits in that cause a part of the record of this proceeding (Transcripts, exhibit #103; Map of the City Limits of the City of Renton, exhibit #104; Diagram of adult entertainment areas, exhibit #105; Aerial photograph showing adult entertainment areas, exhibit #103). These exhibits were admitted in connection with pre-trial issues, but were not submitted to the advisory jury.

Following extensive pre-trial discovery and preliminary issues resulting in a denial of summary judgment in favor of either party, the case came on for trial. An advisory jury was impaneled, pursuant to a ruling by the Court that the same was necessary for the establishing of a community standard in application of the *Miller vs. California* test. The advisory verdict was returned Monday, January 23, 1984 [Advisory Jury Verdict, Appendix 1].

II. *NATURE OF THE APPLICABLE ORDINANCE ENACTMENT*

The first task involves an analysis of the ordinances as enacted and amended, and the implications of the language utilized. (The Text of the Applicable Ordinances. Plaintiff's exhibits #68-71 are as follows, Appendix 2).

As a preliminary summary of current law, ordinances such as that enacted by Renton, will not be stricken as unconstitutionally impermissible restraints upon First Amendment protections, so long as certain tests may be met. Initially it should be observed, that obscene materials in films or otherwise are not afforded First Amendment protection. The problem is to determine which materials may and which may not be so classified and in addressing that classification, the governmental entity

has a burden of overcoming a presumption that the ordinance is invalid where freedom of expression is involved.

Reasonable regulations of time, place and manner of exhibitions of films will be permitted if the regulations are shown to be necessary to further significant governmental interests. Ordinances which effectively curtail total or substantial availability of theatres to the public or prevent entry of new theatres into a limited market, will not be sustained. This would be construed as a total suppression of vital speech interests and would operate as a prior restraint on the content of speech.

When a zoning ordinance infringes upon protected liberty, such as freedom of expression, it must necessarily be narrowly drawn to further a sufficiently substantial governmental interest and is subject to close scrutiny by the courts.

To justify a sufficiently substantial governmental interest, the City must produce some basis in fact and demonstrate that the factual basis was considered in passing the ordinance.

The ordinance in question is modeled after the Detroit ordinance in *Young v. American Mini Theatres*, 427 U.S. 50, 49 L.Ed. 2d 310 (1976), 96 Sup. Ct. 2440 relied upon by our own court and *Northend Cinema, Inc. v. The City of Seattle*, 90 Wn.2d 709, 585 P.2d 1153 (1978).

By way of some difference, in addition to the prohibition of the display of sexually explicit materials in a manner which appeals to prurient interests within 1,000 feet of certain family uses, the Renton ordinance originally prohibited displays within one mile of a public or private school (Ordinance 3526, Section II(a)(2)) and was subsequently reduced to 1,000 feet by amendment.

This court will not restate the long and tortuous history of the struggle for definition in this area of the

law since *Roth v. The United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 Sup. Ct. 1304 (1957) and forward. Many of the cases involve the application of standards with criminal prosecutions being the primary remedy. In recent years, civil proceedings such as abatement for nuisance have been utilized. The decisions are replete with illustrations of the difficulty of obtaining concensus and agreement in individual cases. Literally hundreds of cases have wound their way through the state and federal systems with triers of fact at odds over the application of a subjective standard with appellate review of the final five U.S. Supreme Court Justices being required for finality to the challenge.

If there be a chameleon area of the law reflecting the tenor of the times and public mood, surely this is it. Any review of the development of the law of obscenity illustrates clearly the dramatic change in acceptability of materials and publications in film and mass communications. The shock over such books as "Ulysses" by James Joyce or D. H. Lawrence's "Lady Chatterley's Lover" seem remote, except that one must consider these celebrated legal challenges occurred with respect to these materials not so very long ago in this century. In a society which prizes liberty, tolerance and learning, we are loathe to compromise such values to the realm of easily abused and difficult to define censorship, lest our entire political structure be adversely and irrevocably impacted, as has been demonstrated in other nations where issues of public morality were subsumed by political repression.

At the same time, we must be mindful of competing interests advanced by a public entity on behalf of its citizenry to restrict the exercise of certain activities in support of other legitimate community goals. In assessing the reasonableness of the effort being made through its regulation, it should be recognized that a community has the right and obligation to safeguard its environment in many ways for the enhancement of the

quality of life for its citizens. The government has the right not only to maintain environmental standards of a physical nature, but in a broader moral, public safety and aesthetic environmental framework. Deference should be accorded a local community to set its own parameters unless it must be prevented from doing so because of constitutional prohibitions which must be enforced to safeguard the right of a minority not sharing the dominant community view. However, in matters of zoning generally, communities are given considerable latitude in the forms of their local management and development. It also is important to observe that there is no criminal prosecution involved in this proceeding, which would involve ultimate sanctions against an offender, including the loss of personal liberty, incarceration and the attendant extreme sanctions thereof.

It is important to keep in mind that this is a civil proceeding in which Renton seeks basically to restrict a particular geographical area and eliminate the showing of certain sexually explicit films within 1,000 feet of its churches, family residential areas and schools. The primary issue is, of course, to what extent is Renton able to do so and has it done so properly in this case.

III. *RENTON*

The City of Renton occupies the geographical area of roughly 15.6 square miles with a population of roughly 32,700 and has been incorporated since September 6, 1901. The Renton theatre with which we are concerned is located on a street which must be viewed as the core of the original and on-going commercial central area of the city. Unlike some communities which have been a product of rapid suburban growth only, superimposed on largely undeveloped or minimally developed rural areas, Renton has maintained much of its original downtown core area. This area not only contains commercial uses, but single residences and church and school uses which

have been, and continue to be, a part of a neighborhood. Substantial recent investment in amenities is clearly evident and within a very close proximity of the theatre, residences, businesses, schools and churches, there are also municipal buildings and a series of waterfront parks and recreational and civic use facilities basically within a walking distance. Renton High School and St. Anthony's Parish Parochial School are very nearby, within blocks. There is no issue in this case that the theatre is clearly within the zone which the City wishes to retain free of the showing of sexually explicit films which appeal to prurient interest in sex.

On a broader periphery, Renton is also home to a large airplane manufacturing facility, Boeing, has numerous emerging industrial parks and associated businesses developing in the valley area, the Southcenter shopping section, numerous smaller shopping centers, Longacres Race Track, and of course, is relatively near the airport. All of these uses involve considerable numbers of people moving in and out of those areas daily, although this volume of traffic would not necessarily be attracted to the immediate location of this theatre, but of course, might well be attracted to it as a transient population if it were in operation.

Evidence was introduced which showed that at other locations in Renton shopping areas, the same films being shown by stipulation are readily available for sale or rental through video stores, primarily for viewing in residential privacy. There are no restrictions by the City as to this option. The availability of other specific geographic locations was not litigated in this proceeding. However, as a general matter, a permissible inference may be drawn that Renton does consist of a large geographical area and that elimination of the showing of sexually explicit films at the Renton Theatre will not foreclose availability elsewhere. It is the conclusion of this court that Renton did not purport and will not effectively eliminate the display of sexually explicit films through the application of this ordinance, as in *Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (total ban), *Keego Harbor Company v. City of Keego Harbor*, 657 F.2d 94 (6th Cir.) (1981) (effective ban, a 300 acre city with 3,000 people where there was no location within the confines of Keego Harbor that was *not* within 500 feet of a bar or other regulated use.)

The Renton ordinance simply disperses adult theatres from what it has determined to be an inappropriate location.

In considering whether Renton is entitled to have made such a determination as to this area, in pursuance of a compelling governmental interest which could not be achieved by any less restrictive means, this court would find that it has. It is constitutionally permissible to regulate businesses of this nature in the manner of the 1,000 foot type ordinance as decided in *Young v. American Mini Theatres, supra* and *Northend Cinema, supra.* Even if required to be narrowly drawn and required to further a substantial governmental interest, the ordinance is first, not designed to suppress a particular form of expression. It does regulate certain conduct on a reasonable time, place and manner basis to protect the quality of a neighborhood and important customary amenities and needs thereof.

In *Young* and its progeny, it is noted that concentrations of certain regulated uses, including adult motion picture theatres and bookstores,

> "Tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residences and businesses to move elsewhere." *Id.* at 55, 96 Sup. Ct. at 2455.

For a small commercial area, the impact of one theatre of this nature certainly can be deemed to alter the atmo-

sphere of the neighborhood, is likely to affect property values, deter residents from remaining and adversely will impact criminal activity. It will attract some proportion of individuals of behaviorial deviance with attendant risks to the citizenry as will be further discussed. The experience of other communities in this regard is pertinent. There need not be an elaborate record made in each and every case as to the impact upon a particular area by virture of the one theatre involved. Renton is entitled to take defensive note of the common experiences of other communities and need not introduce the testimony of experts on an effect which is very common in experience. *City of Whittier v. Walnut Properties, Inc.*, 139 Cal. App. 3rd, 618 (1983).

Sexually explicit films are stimulative by definition. The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association, 3rd Edition (1982) itself at section 302.82 states, "watching pornography, filmed or live, causes sexual excitement."

While it may be difficult, of course, to establish that specific untoward predatory sexual overtures are likely to occur as to young children or high school students or others in the vicinity of an adult theatre as a result of over-stimulated patrons of the theatre, there can be some risk of that sufficient to justify dispersal to areas where young people are not likely to be easily accessible.

One of the films stipulated as representative, "*Debbie Does Dallas*," which the advisory jury found obscene, focused upon sex in many forms by older married men with teenage girls. In fact, the high school girls would normally have been of a chronological age under 18. These young adolescent girls are portrayed as highly precocious sexually and engage in various money transactions designed to assist them in accompanying the football team to a game in Dallas. The tone of the film projects a message that these young women are sexually available, knowledgeable, entrepreneurial with respect to sex, and

that sex with young women of this age is not only enjoyable and desirable, but consensual. We also know that it is likely to be statutory rape, a felony, and directly contrary to societal norms evidenced by the most severe standards of the criminal law. One need not be particularly imaginative to see that films of this particular nature are not suitable in the vicinity of a high school or an elementary school. One of the very legitimate interests of Renton is in the security of its citizens, young and old alike.

In the recent case of *New York v. Ferber*, 102 Sup. Ct. 3348 (1982), Justice White in delivering the opinion of the court which approved the constitutionality of a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicted such a performance stated, at p. 3354,

> "First, it is evident beyond the need for elaboration that a state's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' *Globe Newspapers vs. The Superior Court*, —— U.S. ——, —— 102 Sup. Ct. 2613, 2621, 72 L. Ed. 2d —— (1982). 'A democratic society rests, for its continuance upon the healthy, well-rounded growth of young people into full maturity as citizens.' *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 Sup. Ct. 438, 443, 88 L. Ed. 645 (1944).
>
> Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth, even when the laws have operated in the sensitive area of constitutionally protected rights . . . In *Ginsberg v. New York*, 390 U.S. 629, 88 Sup. Ct. 1274, 20 L. Ed. 2d 195 (1968), we sustained a New York law protecting children from exposure to non-obscene literature. Most recently, we held that the government's interest in the 'well being of its youth' justified special treatment of indecent broadcasting

received by adults as well as children. *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 Sup. Ct. 3026, 57 L. Ed. 2d, 1073 (1978).

"The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern: 'There has been a proliferation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the State demands the protection of children from exploitation through sexual performances.' Laws of New York 1977, Chapter 910, Section I."

Justice White recognized and classified child pornography as a category of material outside the protection of the First Amendment. He further observed at p. 3357,

"The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."

Although distinguishable as a school library case, the Supreme Court recently deferred to the discretion of school boards in the daily operation of conduct in the schools as it related to books available in the school library. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 73 L. Ed. 2d 435; 102 S.Ct. 2799 (1982). With respect to a challenge based upon a First Amendment claim, the court pointed out that if the purpose of the school board were the official

suppression of ideas, then First Amendment rights would be violated. However, other purposes such as "educational suitability" in the view of the school board, including removal because of pervasive vulgarity would not (p. 450).

The protection of children from the negative effects of pornography, both as a developmental and safety concern is surely an important state interest, and in fact of compelling and surpassing special interest as these related cases illustrate.

To what extent, it needs to be specifically shown that deviant patrons, of whom there are bound to be some, present a danger to children and others should be determined with the benefit of the doubt to the potential victims. Sexual abuse of children and adults is an extraordinary current societal problem. Protection by the city of this segment of its public and the anticipation of a risk within the vicinity of schools, churches and residential areas is to this court reasonable and the nexus between crime and the presence of such theatres is sufficiently shown by the experience of other communities which Renton should not have to wait to duplicate before being able to enact a protective ordinance.

The very nature of these films encourages imitative conduct. The repetitive style is in the nature of preoccupation and compulsivity. Renton's determination that such a theatre and the exhibition of the films it has described and the legislative purpose findings contained in its ordinances support a substantial governmental interest which this court finds is not feasible to guard against in any less restrictive manner.

Likewise, the preservation of its environment through the use of zoning is a legitimate goal for a city.

"An adult theatre ordinance that furthers such goal satisfies the initial requirement that a city have a substantial state interest to support a law restrict-

ing free speech." *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir.) (1982).

Again, a city need not establish repeatedly the factual basis being considered in passing upon such an ordinance.

> "Identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it. 'Lawmakers in one locale (should not be denied) the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances . . ." See *County of Sacramento v. Superior Court* (Goldie's Bookstores, Inc.) (1982), 137 Cal. App. 3rd 448, 454, 455, 187 Cal. Rprt. 154. "The 'factual basis' behind certain types of zoning laws insofar as those zoning laws require dispersal or deconcentration, has been developed by testimony in other cases. Sociologists and urban planners have testified that a concentration of adult movie theatres in limited areas leads to the deterioration of surrounding neighborhoods. (See *Young v. American Mini Theatres, supra.*) This testimony is sufficient and the City need not bring their own sociologist to apply these observations to the City of Whittier." *City of Whittier v. Walnut Properties, Inc.*, 139 Cal. App. 3rd 618 (1983).

The dispersal of the use covered by this ordinance to a location which will not conflict with family, church and school uses is permisible so long as it does not amount to a total ban and it does not.

Of course, the presence of but one adult theatre exhibiting sexually explicit films may be less easy to demonstrate to be a magnet for the perverse or criminally oriented. Nevertheless, on the basis of the experience of other communities, there is to some degree an offensive presence produced with deleterious environmental and

social impacts. The nexus between pornography and crime is recognized though quantification may admittedly be difficult. Suffice it to say that this court concludes that the potential impact of this use upon a small, cohesive area such as the Renton core neighborhood we are dealing with is intensified because of the small geographical area involved. The court finds the City has managed to retain continuity over a considerable period of time (since 1901), although it is admittedly presently surrounded by suburban growth pressure. This use is clearly out of place in a family-use area and the legislative purpose outlined in the City's ordinances, as amended, are supported. This use is assaultive to the sensibilities of basic community interest in maintaining the wholesomeness of family life and family enjoyment in the vicinity involved. The presence of such a use in itself conveys a message of tolerance, approval and encouragement. No matter what restraint has been exercised with respect to advertising, the titles of the films on the marquee proclaim a glaringly outrageous presence virtually around the corner from St. Anthony's Church and Parochial School, the Renton Latter Day Saint's Church, the King Baptist Church, the Christian Science Church, the Renton Lutheran Church, Awareness of Life Church, the Renton High School and single family and multiple family housing.

In an era in which the community has increasingly demanded higher standards of environmental quality as to visual, olfactory and other physical attributes, i.e., signing, architecture, limitations upon manufacturing and production and controls upon aesthetic pollution, as well as substance pollution, the presence of an adult motion picture theatre which exhibits sexually explicit films of this nature can likewise be considered to violate not only a moral, but aesthetic standard, construed in the broadest sense (See *Discussion*, 90 Harvard Law Review, 196

(1975); *Zoning, Aesthetics and the First Amendment*, 64 Columbia Law Review, 81 (1964)). Communities need not provide the laissez faire cacaphony of business uses typically evident in areas where basically anything goes —head shops, pornographic shops alongside any and all other uses, including family residences. The residents of a particular community have a right to protect the community from danger, degradation of its environment and a dilution of its overall moral standards. This is not simply a matter of appearance, but a significant value. Nothing could be more fundamental to family standards than the basic respect of individuals within a marital relationship in family context which each of these films denigrates. A balancing of interests clearly disfavors forcing the presence of such a use in this location on First Amendment grounds when there is no total or effective ban.

The presence of this type of use to the public also conveys endorsement which the Renton legislative body deems incompatible with reasonable promotion of other valid and superior interests. The behaviors represented in most of these films is deviant and some of it represents behavior which is classified as criminal. The tone of the films is, however, that of an amoral outlook with the behaviors represented as being appealing and not inoffensive pasttimes. Many would argue that our homes are intruded upon routinely by murder, rape, violence and all manner of socially undesirable conduct display and that unlike the intrusiveness of television, adults only are admitted to these theaters and those who disfavor them, need not enter. The problem is of the very presence of such a theatre in itself and where it seeks to operate. Renton has, in a reasonable time, manner and place restriction required the presence elsewhere, and this court concludes that it has done so in a constitutionally permissible fashion, does not trammel the rights of a minor-

ity to materials which however unpopular or irritating may risk oppression and censorship which is admittedly abhorent to a free society, and are readily available elsewhere in the community.

This court joins the conclusion of the Federal court that this ordinance is constitutional on its face and as applied and that the mechanism for abatement and standards employed are entitled to enforcement.

IV. *TEST OF THE MATERIALS*

The approach of this Court to this problem has been to assure several important procedural safeguards:

1. An advisory jury representing a cross section of our community was utilized to view and consider application of the standards enunciated by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 419, 93 S. Ct. 2607, reh. den. 414 U.S. 881, 38 L. Ed. 2d 128, 94 S. Ct. 26 (1972) to establish the degree of protection which may be required as to certain enumerated films.

This jury was drawn from the jury pool in the King County Superior Court and represented a cross-section of individuals and background and resulted in a unanimous collective determination as to the ten films in its verdict and special interrogatories (Appendix 1).

There were six men and six women ranging in ages from 31 to 68, three men were single without children, as was one woman, and the rest were married, one divorced with children. The combined number of years in the State of Washington was 310; the combined number of years in King County was 270. (See Table below. Information submitted by jurors to King County Superior Court utilized by counsel in voir dire. Ct. Exh. #107.)

Demographics of the Advisory Jury

Sex	Age	Marital Status	Family	Birthplace	Yrs. in State	Yrs. in City	Current Residence	Yrs. of Education	Occupation
M	37	S	—	No. Carolina	9	9	Seattle 98122	14	Utilities
M	31	S	—	Okinawa	8	4	Seattle 98144	16	Postal
M	38	S	—	San Diego, California	35	35	Seattle 98102	16	Sales
M	59	Div	30, 37 33, 25	Wisconsin	35	14	Auburn 98002	10	Shipping Clerk
M	39	M	18 9 20 14	Seattle	39	39	Federal Way 98003	14	Lineman
M	34	M	28 3 3 mo.	Los Angeles, California	34	13	Seattle (S.W.) 98146	18	Teacher
F	68	M	18 38 10 36	No. Dakota	4	4	Seattle (S.) 98178	8	Aviation Production
F	32	M	18 3	Victoria	14	14	Seattle (N.W.) 98107	16	Homemaker
F	54	M	28 30 10 22	Seattle	50	50	Bellevue 98006	14	Homemaker
F	35	M	18 10½ 20 16, 13	So. Dakota	22	22	Seattle (N.W.) 98117	12	Homemaker
F	38	S	—	Seattle	38	33	Seattle (W.) 98199	16	Postal
F	63	M	20 40 41	Missoula, Montana	33	33	Kent 98042	12	Aviation Production

The court utilized this process to establish a community standard which would be based on the collective contemporaneous judgment of representative members of the community, hopefully to avoid some of the uncertainty and difficulty of utilizing only subjective judicial opinion. This problem is well illustrated in *Penthouse International v. McAuliffe, et al.*, 610 F.2d 1353 (1980). If every community must wait for the subjective opinion of the last five United States Supreme Court Justices, it would seem to this court that there is no effective remedy for a normal community with the usual public resources. No issue, it would seem to this court, should be without some more reasonable finality. Therefore, the court utilized a procedure similar to that of *State ex rel. Cahalan v. Diversified Theatre Corporation*, 229 N.W. 2d, 389 (1975), a Michigan case in which the court impaneled an advisory jury to determine whether the films in question were obscene and could be abated under the Michigan nuisance statute. The court in that case utilized the three prong test of *Miller v. California* and the jury returned a verdict finding *The Devil In Miss Jones, Deep Throat, It Happened In Hollywood* and *Little Sisters* obscene.

Because of the equitable nature of the relief sought, some question exists as a matter of right to trial by jury. However, this court believed that this was a sensible procedure to follow, if not necessary to secure an expression of a community standard through the community itself.

2. Secondly, as stated in the foregoing, the *Miller* test was utilized to assist in establishing the extent to which the materials were entitled to constitutional protection. It is conceded that no protection is necessary for materials which are obscene.

   The ordinance definition of "used" in definition of "adult motion picture" describes a continuing course of conduct of exhibiting "specific sexual activities" and "specified anatomical areas" in a manner which appeals to a prurient interest (Ordinances 3629, Section I, 3637, Section I, emphasis supplied). The utilization of the single test would ignore the now well accepted three prong constitutional test of delineation of obscene materials required by *Miller v. California, supra*, and any lesser test would seem to be constitutionally inadequate unless the Supreme Court of this state determines in an authoritative construction of state constitutional standard that a lesser standard is adequate.

3. In recognition of the key societal principles involved, this court further applied a high standard of proof, i.e., clear, cogent and convincing, rather than that of a simple preponderance of the evidence.

The burden of proof was placed upon the government and the standard employed is that utilized in *Cooper v. Mitchell Brothers Santa Ana Theatre, et al.*, 102 Sup. Ct. Rptr. 172 (1981). This was a public nuisance abatement action and the United States Supreme Court determined that proof beyond a reasonable doubt would not be constitutionally required.

In *Cooper*, the court also utilized a jury on the issues of obscenity, public nuisance and damages prior to the resolution of the equitable issues by the court. The jury found 11 films obscene, 4 not obscene and was not able to reach a verdict on two others. *Cooper* had a complex litigation history as well. See 101 Cal. App. 3d 296, 161 Cal. Rptr. 562 (1980); 114 Cal. App. 3d 923, 171 Cal. Rptr. 85 (1981); 118 Cal. App. 3d 863, 173 Cal. Rptr. 476 (1981) and 128 Cal. App. 3d 937, 180 Cal. Rptr. 728 (1982). (*Deep Throat* and *The Devil In Miss Jones* were determined obscene among others, but the litigation amply demonstrates the difficulties of taking action in any efficacious manner.)

It is essential, of course, in issues involving prior restraint that the mechanism for a determination be consistent with standards which preclude arbitrary or all encompassing discretion reposed in a governmental official under vague or problematical speculative standards. An action to abate places the tender before the court and the process utilized employs a recognizable application of law by a jury which will apply a community standard best known to those who comprise it. If one is to conclude that the shifting sands of public opinion as to these matters renders this an impossible task, then no regulation would be possible at all.

The City of Renton, in its ordinance, in providing for an action to abate a nuisance contemplates a civil rather

than a criminal proceeding. Normally, this would entail a more relaxed standard of proof; however, as stated, in response to the vital issues raised with respect to protected speech, this court has utilized the *Miller* test and a higher standard of proof commensurate with constitutional requirements.

V. *THE FILMS*

The full record of films exhibited at the Renton Theatre commencing in January 20, 1983 consists of 64 films (Exhibits 1A-64A represented by video cassettes entered into evidence and stipulated to be identical to films shown at the theatre and times in question). The ordinances in question were enacted, amended and predate the challenged exhibition. There is no suggestion in this case that the ordinance was designed to put the Renton Theatre out of operation after the fact.

The parties also stipulated that ten representative films would be viewed by the court and the jury in a specific order and that these films were representative of the film fare exhibited at the Renton Theatre. The court determined that the films would be shown in the theatre, rather than in the courtroom to provide as normal as possible the context in which the films would be normally exhibited.

The films were seen on three successive days. Recesses were taken in the morning, afternoon and at noon.

As an overall finding, this court finds that each of the films selected is characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas as defined in the Renton ordinance. Although the films vary as to emphasis, the court finds such emphasis to overwhelmingly predominate in each and every film and to be the central focus of each of the films taken and considered as a whole.

The exhibition of the ten films occurred in the following order:

1. Little French Maid
2. Devil In Miss Jones
3. Up and Coming
4. Society Affairs
5. San Fernando Valley Girls
6. Deep Throat
7. Body Talk
8. Pandora's Mirror
9. Debbie Does Dallas
10. Taboo II

Instruction 14 directed the jury under the *Miller* test:

> "In order to find a motion picture film obscene, as that term is used in these instructions, the plaintiff must prove each and every one of the following elements by clear, cogent and convincing evidence.
>
> 1. That the average adult person, applying contemporary community standards, would find that the motion picture film, taken as a whole, appeals to the prurient interest in sex; and
>
> 2. That applying contemporary community standards, the motion picture film depicts or describes sexual conduct in a patently offensive way; and
>
> 3. That the motion picture film, taken as a whole, lacks serious literary, artistic, political or scientific value."

Instruction 8 defined "prurient" as follows:

> " 'Prurient' as that term is used, means a shameful or morbid, meaning unhealthy or unwholesome interest in sex or nudity."

In addition to the video cassettes, the City of Renton offered certain time and motion studies which were refused by the court (Exhibits 1B-64B).

Certain exhibits were admitted pertaining to the City's statistical analysis and printout in support of its chart illustrating the percentage duration of each film illustrating specified anatomical areas or specified sexual activities exhibited at the Renton Theatre (Exhibit 73, 73A, B, C, D).

The quantitative analysis by the City as to the stipulated films was generally:

1.	Little French Maid	68%
2.	Devil In Miss Jones	70%
3.	Up and Coming	37%
4.	Society Affairs	45%
5.	San Fernando Valley Girls	70%
6.	Deep Throat	64%
7.	Body Talk	38%
8.	Pandora's Mirror	52%
9.	Debbie Does Dallas	74%
10.	Taboo II	65%

The court also generally correlated sequence duration and finds that the time and percentages estimated by the City are sufficiently accurate. The court also finds as an overall finding, that all of the films include a substantial content of highly repetitive, sexually explicit conduct, which includes masturbation, fellatio, cunnillingus, oral, anal and vaginal sexual intercourse, often occuring simultaneously and involving several people, repetitive ejaculation visibly displayed, to the body and usually to the face of female participants. Same sex activity was limited generally to women, although mixed groups of men and women such as two men and one woman or two women and one man or numerous people engaged in vari-

ous activities simultaneously was common. No film contained any extreme sado-masochism behavior, forcible rape or violence, assaultive or mutilative behavior. The films contain various types of male dominance and female submission. Human genitals were overwhelmingly portrayed in a state of sexual stimulation or arousal. There was continuous erotic touching of human genitals and private areas, pubic regions, buttocks and female breasts. Specified anatomical areas were continuously displayed in many instances for long periods of time over nearly the entire area of the motion picture screen and sequences were repetitive and continuous.

Except for one film, *Body Talk*, sex was not treated in any manner as part of a meaningful or serious relationship, but as a mechanical function with an emphasis on endurance, athleticism and release. The women are dehumanized and reduced to objects of sexual access. Women are projected generally as nymphomaniacs.

Some of the films include scenery, classical music, expensive cars, houses and settings and some backgrounds for interest. Despite this flimsy attempt, and some of the more recent films do reflect greater production budgets, the primary and overwhelming purpose of these films is to focus upon erotic sexual activity.

This court agrees with a film commentator, David Chute when he says,

> "Most hard core films are still produced by and for men and female viewers quickly realize that the show is not intended for them . . . The emblematic figure here, I think, is not the female lust object in a pornographic film, but the male star with whom the male viewer is invited to identify. He is our standard bearer." 17 Film Comment 66 (S/O 1981) P. 68.

Chute describes the two typical male leads as one who has built a career shoving women around and the other

more recent being a person out for kicks and not power. (p. 68) The films challenged by Renton are typical of the foregoing. (For additional writing in this field, see *Pornography and Silence*, Susan Griffin, Harper and Row, 1981; see also *The Report of the Commission of Obscenity and Pornography* (1970).

While there has been some effort to sanitize the more extreme abusive and sexist aspects of this type of film in the more recent film productions, there is little question that the basic appeal is of an erotic sexual nature for men. When Mr. Forbes testified with respect to the advertising available for the films, it is clear that the basic appeal of the films as projected by himself in making the advertising selection on several occasions reflects this basic acknowledgement of the nature of the film as a basically erotic type of presentation. (P. Exh. 72, including dates of exhibition.) To claim that they appeal to interest other than prurience is not arguable; as to what degree of prurience may be arguable only.

VI. *THE TEN FILMS*

1. *The Little French Maid.* In spite of a background of classical music, residential backgrounds and colorful garden and outdoor photography, this is basically a string of sexually erotic and explicit scenes in which the heroine goes from vaginal, anal and oral sex repeatedly, and talks and muses about it when she is not actually doing it. There is no story line with the possible exception of the last liaison being one she sees as being more promising in a love sense. However, the film is monotonously repetitive in its complete emphasis on sex acts between the heroine, a man, two men, or two women, with the locations of the events changing from residential locations. Approximately 68% of the film is devoted to such erotic scenes.

The emphasis of the film is on the observation of the various sexual depictions and is devoid of any other con-

tent. It is a film which centers completely upon the use of the maid by the men which she does not find particularly satisfying but continues to participate on a presumably voluntary basis. There is no force. It is voyeuristic, patently offensive in its banality and reduction of the sexual experience to a fairly mechanical interface of varicus sexual organs and has no discernible scientific value or any other value whatsoever.

The jury found this film obscene within the meaning of the instructions and the Court concurs in that finding.

2. *The Devil in Miss Jones.* The film starts with a graphic depiction of a young woman slitting her wrists in a drawn bath and comitting suicide with the blood merging with the bath water. The film is in dark tones, which intends to accentuate the imagery. (This could be due to the age of the print.) Having committed suicide, Miss Jones is advised that she is condemned to eternal damnation, which the devil manages to provide for her in the form of sexual tutelage to which she becomes very enamoured only to be relegated in the end to an eternity of sexual frustration.

This film has an eeriness and creepy quality to it as it is not only offensive to the notion of sex, but to religion as well, and the ultimate sense of self loss and cosmic powerlessness. It courses through the usual variety of sexually explicit and erotic scenes, including graphic and complete illustrations of anal and oral sex, a pair of women making love, use of a snake, all occurring with complete and total depictions and occupying significant episodic time sequences. 70% of the film footage is utilized for sexually explicit erotic scenes.

It is not difficult to see how the jury found this particular film patently offensive and without any serious scientific value or unacceptable to contemporary community standards. The Court would concur in the jury finding.

3. *Up and Coming.* This is a newer film with a higher production budget than earlier films. It is in color and actually has interesting country music in it. It also is the story of a young woman who is attempting to become a country music star and goes from one sexual adventure to the next in her quest in graphic detail and with the usual oral, anal, vaginal, group, single and combination sexual activity to realize her ambitions. However, the film does use approximately 40% of total time in the sex related depictions and the balance for the story. The jury did not find this film obscene, probably determining that it was not offensive enough; there was a story line, some humor and a plot that was less of a transparent vehicle than in some of the other films. The Court defers to the judgment of the jury.

4. *Society Affairs.* This is one of the more recent, higher production budget films which has a story line, good photography, interesting music, good settings as well as the usual smorgasbord of sexually explicit activity as between women, a woman and one or two men, singly or simultaneously, a variety of relationships and it all centers around the wedding of an heir. The heir's father is attempting to set him up in marriage with a woman who will divorce him and secure a large property settlement for the benefit of the father, with whom she is sexually involved.

The hero is a look-a-like for the heir and goes from one sexual dysfunction rescue to the next in graphic detail and with the usual oral, vaginal and anal sexual exercises and Herculean phallic displays. He ultimately uncovers the nefarious plot of the father and saves Howard his fortune, though his original intent was simply to steal all of the wedding gifts which he now secures in gratitude from Howard. Approximately 40% of the film time is devoted to sex, the rest to the story, and the jury did not find the film obscene.

The Court defers to the finding of the jury.

5. *San Fernando Valley Girls.* This is a silly movie about a style of individual whose language is peculiar to the area youth culture. Adjectives such as "tubular" repeat through the film and the emphasis is upon sexually erotic encounters between the girls, the girls and a man or more than one man, or a mix. Except for the thread of a Valley Girl Contest in a club, there is nothing else in this film other than the views of the usual oral, anal, and vaginal sexual activity, long depictions of sustained erection and ejaculation onto the mouths or onto the bodies of the young women in presumed enjoyment.

Approximately 70% of the entire film was devoted to erotic imagery, and only 30% to other scenes. The jury did not find this film obscene, and the court defers in their finding, though it is in a closer category in the Court's view to *Little French Maid.*

6. *Deep Throat.* This is a story of a sexually unfulfilled young woman who is guided to the discovery of sexual fulfilment when her therapist locates her clitoris in her throat. After that, it is largely repetitive and compulsive enjoyment of oral sex with some variations with the scenes of sexual activity occupying approximately 60% of all film footage. She is utilized as a kind of assistant to the therapist and her various sexual encounters then involve various individuals and their respective therapeutic need circumstances. One such individual, for example, has to utilize a burglary/rape scenario and she is supposed to pretend that she is frightened. The therapist is also repeatedly engaged in sex. The emphasis of the film is clearly upon erotic sexual material. There is some element of farce. The jury did not find this film obscene and the court defers to their finding, although this film has been repeatedly found obscene elsewhere relatively recently.

7. *Body Talk.* This is a more recent higher production cost film in color and with an emphasis upon interesting locations. An older woman who is financially maintained by a voyeur falls in love with a young sculptor whose parents disapprove of the relationship. The woman magnanimously arranges for them to separate and he to go to study art abroad as a gesture when she discovers she is terminally ill and eventually the young sculptor learns the true situation and they are reunited briefly before her death.

The story does occupy a substantial portion of the film and approximately 40% is devoted to the usual scenes of oral, anal, vaginal and group sex. There are sex scenes involving women together, a woman and one or two men, with the voyeur watching at some scenes. This is a pornographic soap opera.

The jury did not find this film obscene under the *Miller* test and the court will defer to that finding.

8. *Pandora's Mirror.* A young woman becomes entranced by a mirror which transports her through several historical vignettes in which erotic sex occurs in various contexts. She becomes compulsively attracted to the mirror and what it provides. About 52% of the film is devoted to sexually erotic scenes of intercourse of an oral or vaginal nature, sustained erections, ejaculations and the usual similar material to the other films. The photography, settings and staging is more subtle and reflects a more interesting production style, but is voyeuristic in a compulsive sense.

The jury did not find this film obscene under the *Miller* test criteria and the court defers to their finding although it is indistinguishable from those found to be obscene.

9. *Debbie Does Dallas.* This is a film in which a group of high school cheerleaders attempt to raise money to accompany the football team to a game in Dallas through babysitting, car washing, etc., and are soon able to im-

prove upon the financial yield by exchanging a variety of sexual favors to various men, usually married men who are ostensibly either an employer or school superior. There is also sexual activity graphically filmed as between the girls and their football player boyfriends.

This film emphasizes the same type of sexual material that the other films contain by way of sustained erections, oral, anal, vaginal sex, ejaculations and promiscuous behaviors with the additional element of an emphasis upon very young women and men. Though the film carries a written legend of the girls being over age 18, the obvious content of the film infers a younger chronological age, age 16 if not younger, and is very offensive in that regard, not only because of the nature of the activities which are in the film, but because of the emphasis on the desirability and availability of very young women to older men in this fashion.

The film is apparently a species of film where the preoccupation with the young is primary. The message of the film is clearly that the young are experienced, knowledgeable and available. The distance between a film depiction and re-enactment in real life is too close for comfort. This film is beyond the usual voyeurism inherent in pornographic viewing, but can easily lead from myth to real life in a highly sensitive area, i.e., sexual abuse of the young which is clearly a violation of criminal law as well as an extreme breach otherwise.

Nearly 70% of the film was devoted to sexually explicit erotic scenes. The jury found this film obscene and the court concurs in that finding.

10. *Taboo II.* This is a film in which a family wallows in incest. The brother is able to achieve a sexual relationship with his girlfriend, his sister, a friend's mother and his own mother. The sister is able to entice her father into a sexual relationship with her mother sleeping in the same bed, the entire culmination of which is then

satisfying sex for the parents whose marriage has deadened and the father attracted to a sexual relationship with his secretary. 65% of the time of the film is involved in erotic depictions of the various individuals or friends engaged in group or sexual activity with one another or in groups and the activity is generally similar to that portrayed in all of the other films. It is the context of blood family members which makes this film very different and highly offensive and perverted, and without any value, let alone serious scientific value.

The jury found this film obscene under the *Miller* test and the court concurs in that finding.

VII. *THE EXPERTS*

Richard Green, M.D., is a research oriented psychiatrist from the Department of Psychiatry, State University of New York, Stonybrook. He took an undergraduate degree in Psychology from Syracuse University, his medical degree from Johns Hopkins University, Baltimore, continued his studies at the University of London, was a faculty member at the Human Sexuality Program, University of California between 1968 and 1974 and thereafter established the Human Sexuality Program at (SUNY), Stonybrook where he is engaged in research as contrasted to treatment. He has 100 professional publication credits and is a contributor to six medical volumes.

At the request of the defense, he reviewed 8 or 9 video cassettes of the films (excluding *Taboo II*). He basically testified that all of them have serious scientific value when considered as a whole.

Dr. Green participated as a committee member in the development of the American Psychiatric Association's DSM III criteria and would utilize that definition in identifying those sexual behaviors which would appeal to prurient interests. He would include bestiality, transvestism, exhibitionism, voyeurism and sado-masochism.

He would also include compulsive rapism, lust murder and necrophilia, which is not specifically listed in the diagnostic criteria.

Dr. Green testified that the films had serious scientific value basically because they were capable of promoting better communication around sex and better understanding. Where he found a story line or entertainment factor, he would focus upon that circumstance as being the primary interest of the film. He did state that he would not wish to testify concerning a variety of films which included bestiality, kiddie porn, rape and torture episodes. He did not see these films as transmitting a particular value system, i.e., prostitution, and did not see them as producing imitative behavior, although he did say that couples might be willing to expand their repertoire with the assistance of the variety of sexual behaviors illustrated in the films. When asked if many of the films reflected that one partner was using another, he did not find this disconcerting in that, as he said, there appeared to be an equal amount of using of one by the other of the various individuals.

The films themselves are, of course, the best evidence of what they depict. Expert testimony, though affording the benefit of opinion as to them, is not binding on the triers of fact.

While this court does respect the training, education and research efforts of this witness, it finds that the conclusion advanced are unsupported by the films themselves.

It also should be noted that this witness has testified approximately 28 times, always for the defense and on about one-half of those occasions, retained by defense counsel in this case. Very significantly, this witness has never found any material without some serious scientic value. So long as some information is contained, Dr. Green would be satisfied of its serious scientific value. If that standard were to be employed by this Court, that

would amount to no standard at all, and it is the view of this Court, that the term "serious scientific value" must be interpreted in a stricter, scholastic sense of valid, academic research process and product.

The witnesses for the defense appear to have had some strong connection and acquaintance, if not an on-going collaboration in advancing sexology as a separate academic speciality then in some more informal manner. These witnesses are not typical of the usual independently retained expert. While this is not as true of Dr. Satterfield of Minneapolis, the others appear to be associated in various ways and cannot be seen as independent from one another nor very objective, since their commitment to their views is quite clear and apparent.

Ms. Carolyn A. Livingston was called by the defense. She is a sex therapist who has been trained at the Institute for the Advanced Study of Human Sexuality established by another witness called by the defense in this case, Robert Theodore McIlvenna.

This Institute was incorporated in 1976. The State of California permits the Institute as of June 1981, to confer a Doctor of Education in Human Sexuality Degree (Ed. D.) as contrasted to a Ph.D. The catalog (plaintiff's Exhibit #3) also indicates that a Ph.D. candidate prepares a traditional dissertation, and also indicates additional degrees, Master of Human Sexuality (M.H.S.) and a Doctor of Human Sexuality (D.H.S.). There are also professional programs which award certificates, including Forensic Sexologist certificates and a summer certificate program. Ms. Livingston secured a Doctorate from the Institute and her research work involved studies of Venusian Church members in the Seattle area.

Ms. Livingston is also a trained registered nurse. She speaks to many groups throughout the state, mainly in medical contexts such as the Providence Hospital Cardiac Unit, Post-Surgery, Ileostomy, Alcoholism Recovery, Sex-

ual Adjustment and estimates that she has spoken to approximately 7,000 people. She speaks mainly to physicians, nurses, social workers, students at various colleges and various community groups.

She does not use the films involved in this litigation in her presentations, although she does use other film materials.

She testified as to the films that their fantasy and educational, therapeutic and communication content supported in her opinion a serious scientific value criteria of the *Miller* test. She testified that none of the films, in her opinion, appealed to a prurient interest in sex.

She surprisingly testified that she felt *Deep Throat* was capable of being shown on prime time television, suitable for viewers 16 years of age and over. She would define morbid to the point of being nearly pathological or making one sick and would include in that, sex with animals, voyeurism, exhibitionism, and the use of children.

The defense witnesses shared the view that the reason for attendance at such films was a healthy curiosity about sex.

This witness appears to the court to be sincerely motivated in assisting individuals in overcoming medically related sexual dysfunctions or disabilities. Her views, however, with respect to the relative mildness of the films in issue as compared with an available range she may be familiar with, does not necessarily reflect the Washington overall community standard which this court finds to be more restrictive than the standard advanced by this witness. The court finds that her audiences are not as cross sectional as our randomly selected jury.

On cross examination, Ms. Livingston did acknowledge her concerns that certain of the films were therapeutically defective. For example, she did acknowledge the risk of

transfer of bacteria from one bodily cavity to another with uninterrupted progression from oral/vaginal/anal/oral/vaginal sex without hygienic cleansing. She also questioned the concept of a therapist and patient engaging in sex such as was portrayed in *Deep Throat*; testified that she was opposed to public sex, although she did not equate the film scenes depicting group activity as such. She also testified that she was not comfortable with *Taboo II*.

Again, the very general use of "science" as potential self-help is not viewed by this court as comporting with the formal systematic, empirical study and examination normally associated with that term and the intent of the United States Supreme Court in that connection.

Dr. Sharon Satterfield is the Director of the University of Minnesota Medical School Sexuality Program, which she stated to be the largest medical school clinic of its kind in the United States, both as a treating and research facility. Dr. Satterfield specializes in Child Abuse (sexual) and conducts a treatment program for perpetrators, mainly middle class patients (currently 70 offenders). This witness has extremely high professional credentials. She has testified previously in favor of a proposed Minneapolis ordinance to the consternation of Mr. McIlvenna and she has participated in governmental regulation.

She is well acquainted with the professional literature and acknowledges that she has seen some cases of habitual use of pornography, one or two compulsive users.

In treatment, fantasy provides for a broader communication and she testified that the underlying fantasy of offenders must be surfaced in the treatment process. She would see the fantasy stimulation content of *Devil In Miss Jones, Pandora's Mirror* and all of the films as containing serious scientific value and testified that such films have been used with positive results in treatment.

Her definition of science is a broad definition of a systematic acquisition of knowledge.

The court is at a loss with the testimony of this highly qualified physician and concludes that she simply has been persuaded and holds the views held by Mr. McIlvenna and Dr. Green which this court has not accepted as controlling in this case.

Robert Theodore McIlvenna is the Director of the Institute for Advanced Study of Human Sexuality. He also is an ordained United Methodist Minister. He is a leader in the effort to establish sexology as a separate discipline and is the leadership force in an international, as well as national effort in that regard. He has testified in many courts. He has accumulated considerable data drawn from Sex Attitude Profiles from all persons engaging in programs with his institution and has undertaken field research and has had on-going professional contact with many institutions in the Northwest and various professionals.

The Sex Attitude Profiles are updated every six months, one, two and five years, with some attrition factor. The court observes that those who submit these profiles are, of course, individuals who are willing and interested in revealing such information about themselves which indicates a certain self-selection in the group sample represented.

In testifying as to his opinion that none of the films appeal to prurient interest, Mr. McIlvenna characterized *Deep Throat* as mythology, *Devil In Miss Jones* as a classic film, *Debbie Does Dallas* as one of the most popular films of all times "which simply shows a lot of sexual activity," *Taboo II* as a "thinly guised incest thing . . . (where) everyone knows what is going on and goes home, *Little French Maid* as a series of sex activities."

This witness testified that he knows Dr. Green, Dr. Satterfield and Ms. Livingston. He acknowledged that he

was shocked and dumb-founded at Dr. Satterfield's pro-regulation testimony in Minnesota. He himself has testified for the defense on all occasions. He discussed that the testimonial fees he receives are used to balance his research funds for institute activity.

While Mr. McIlvenna was permitted to express an expert opinion because of his on-going collection of data and experience in the Washington area, it is the conclusion of this Court that his attitudes are greatly influenced by his commitment to his organization and its purposes and are more reflective of a limited San Francisco environment than that of this state. His data is not reflective of the mainstream of Washington residents and as the jury verdict reflects. Further, certain personal strategies of a therapeutic nature utilized by Mr. McIlvenna are professionally unsupportable and created considerable question in the mind of this trier of fact as to the professional judgment utilized by Mr. McIlvenna in his professional work.

The City of Renton introduced the testimony of *Professor Ernest R. Van Den Haag*, a treating New York psychoanalyst and current Professor of Jurisprudence at Fordham University. Professor Van Den Haag has taught law and has lectured widely at various prestigious academic institutions, including the Harvard Medical School, Yale, Stanford, Berkelev and taught at the New School for Social Research. taught at the latter a course in Love and Sex. He has written extensively in the area of pornography which he readily admits he opposes in all forms. His lectures are concerned with the separation of sexual gratification from affection, love as between individuals and forms of love such as between parent and child and between man and woman.

He defines science as an attempt to discover new facts for the purpose of being able to control or predict behavior. He rejects fantasy enrichment as any part of scientific endeavor and sees these films as reducing the

participants to the functioning of their sexual organs. He finds that there are clearly messages in the films of a misleading and harmful nature.

He views *Taboo II* as recommending incest between a father and a daughter as a means to promote a better sexual adjustment between the parents whose marriage is vapid. He sees *Little French Maid* as outright promiscuity which in turn he views as a self-destructive phenomenon leading to personality disintegration of the participant.

He sees none of the films as healthy or wholesome and views the humans as being either mutually exploitive and utilizing the women as sex objects. He testified that in his view, no one in the films has any real interest in another person and only as a means to selfish sexual gratification.

As to the emerging specialty of Sexology, he would find this highly questionable, though he did recognize that there have been past scholars who have attempted to address the subject in more particularity, notably Kraft-Ebbing, Herschfeld, Freud, Black, Mircuse.

He believes that some people who attend these films are curious, others addicted and obsessed with the movie replacing gratification and becoming a masturbatory stimulus and he believes the same to be anti-therapeutic in that some persons can become dependent on such films as a sexual outlet. He testified that he has personally studied the attendance of persons at such films and estimates that approximately 20-25% of the attendees are habituals. He bases this upon his own observations and inquiries regarding practice of attendees and employees personally communicated with by himself at the theatres. He estimated that of 300-500 patients and approximately one third attending movies, he estimates that a half again of those, he would consider addicted or compulsive habituals.

In discussing the pathological aspects of the films, he pointed to the excessive and dangerous sexual attachment to a parent in *Taboo II*, the pleasure of voyeurism in *Pandora's Mirror* and saw the love affair in *Body Talk* between the woman the young sculptor as being merely after-thought.

In his opinion, none of the films had any meritorious value as would be required under the *Miller* test and hence, all would be obscene.

Dr. Jack Raymond Faghin, is a practicing clinical psychiatrist in the Seattle area who has treated patients with sexual problems since 1953. His patients include a broad spectrum of economic, age and cultural groups. He acknowledged that he does not publish because of the demands upon his time by his treating work, attempts to maintain current knowledge of medical and professional materials in the field and is generally familiar with conventional media publications. He is especially interested in sexual abuse issues, particularly as to children.

He testified he is unaware of any scientific article which explores the nature of individuals who attend sexually explicit movies. He did state that he was able to find a three line comment indicating that sexually explicit films could be useful in a treatment modality. He, himself, does not us films and testified that he would not send a patient to such movies, as he believes in guided therapy.

He would not support sexology as a separate discipline because he believes that it is professionally mandatory to consider the interaction of the entire personality and he cites other professionals as being in support of that position, including Dr. Helen Singer-Caplan of Cornell and Dr. Harold Leaf of the University of Pennsylvania.

In considering the ten films, Dr. Faghin expressed his opinion that none of the ten have any serious scientific value. He rejected the proposition that fantasy value was

equivalent to scientific value or that comunicative value was of scientific value, although he would acknowledge that it could be useful. Likewise, he found no serious educational or therapeutic value in the films.

As to the latter, he believed that the film messages were in fact harmful. He testified that in *Taboo II*, in his opinion, the impression is given that incest is acceptable, and as a physician, he testified forcefully that in no instance has he ever seen any benefit derived as a result of incest. In fact, it was, in his view, clearly harmful.

He believed that the overriding message of *Debbie Does Dallas*, i.e., the exchange of sexual favors for money, is a similarly negative message and not therapeutically useful, but destructive.

He testified that in his opinion, all of the films appealed to prurient interest, are patently offensive and breach our community standards.

He especially referred to sex with patients as being decried by every reputable professional organization in the country in criticizing *Deep Throat*. He was candid in saying that the public might tolerate movies in an adult theatre, it would not find acceptable on prime time television.

Dr. Faghin, in this court's opinion, was the witness most closely familiar with the state population with which we are concerned in establishing a community standard.

He also has direct clinical experience with this community over many years of a highly qualified nature.

This court has accepted his testimony as being the most professionally acceptable and accurate in reflecting a professional whose approach is to consider the integrated personality, testimony which is more probative by virtue of being locally clinically corroborated and offers an acceptable and reputable medical standard.

His testimony, as it is consistent with that of Professor Van Den Haag is also borne out to a greater degree by our advisory jury who rejected the views being advanced by the defense.

While not obligated to do so, this court has accepted the verdict of the jury as the basic expression of our community with respect to the issues being considered. The jury thoughtfully and deliberately considered each film as the special interrogatories indicate, and returned their verdict.

The jury was able to consider each film independently as their special interrogatories reflect. While this court might in some particulars vary in view as to the individual films and the ultimate conclusion reached, it has determined to accept the collective expression of this jury as being reasonable and will confirm the same, finding also that each of the films is substantially similar in genre as depicting "specified sexual activities" or "specified anatomical areas" in a manner which appeals to a prurient interest in sex as a continuous course of conduct since January 20, 1983.

The Court recognizes the jury verdict as being the primary community expression of the standard applicable. In finding four of ten films obscene, one might view 40% in too literal a mathematical sense. The ten films stipulated to by counsel do not necessarily reflect the most offensive nor the mildest of the total sixty-four films and must be considered as a compromise group. It is the conclusion of this court in view of this circumstance, that there is in fact a heavy weighting in the direction of unprotected materials. The court finds that the jury verdict more than suffices to support the continuous course of conduct requirement of the ordinances, and that inasmuch as all of the films reflect an identical genre and emphasis, that their exhibition should be abated at the Renton Theatre.

VIII. *THE REMEDY*

Abatement as to the exhibition of the films determined to be obscene is clearly appropriate and will enter.

The Court is prepared to find that there is no adequate remedy at law available to the plaintiffs short of restraining the defendants from exhibiting at the Renton Theatre, films such as those demonstrated to have been shown continuously since January 20, 1983, and that the four films found by the jury to be obscene are substantially identical in genre to those displayed generally and represented in the six other stipulated films, that the exhibition of these films does constitute a nuisance per se, and an "adult motion picture theatre" as defined in Renton Ordinance No. 3526 as amended, and that the same should be abated by injunctive order. The question of further available equitable remedy is reserved by the Court for additional submission of law under the law of the State of Washington pertaining to injunctions and abatement and other remedies as may be appropriate.

What is less certain is the availability of other sanctions under the general equitable power of this court under state law. Other courts have struggled with this question. *Van deCamp v. American Art*, 188 Cal. Rprt. 740 (1983). There is merit in the argument that the court should be empowered to utilize flexible, equitable remedies if permitted by state law. The question of the full form and detail of injunctive relief will therefore abide additional legal submission and additional presentation.

DATED this 9th day of March, 1984.

/s/ Nancy Ann Holman
NANCY ANN HOLMAN
Judge